

Bruce A Timmons

June 9, 2015

The Honorable Kurt Heise, Chair, House Committee on Criminal Justice  
Members of the House Committee on Criminal Justice

Re: **HB 4419** (Heise) - Criminal procedure; sentencing; eliminate 2-year mandatory sentencing requirement for felony firearm conviction. Amends MCL 750.227b.

**HB 4420** (Gay-Dagnogo) - Criminal procedure; sentencing guidelines; revise sentencing guidelines for crime of felony firearm. Amends MCL 777.16m.

HB 4419 as introduced is ambiguous. As this Statement is being typed, I am aware that changes are expected to HB 4419 but have not seen the latest version of a substitute. My concern is less with elimination of the flat mandatory term of imprisonment than with how the bill is ultimately drafted and with expectations of what a change will do.

I am not a fan of mandatory minimum prison terms, although as staff I covered a few such as the 650-lifer law which has since been eliminated. Michigan does not have many mandatory minimums historically beyond life without parole for first degree murder or conduct causing death. Gov. John Engler strongly opposed mandatory minimum prison terms and "dissuaded" several proposals during his tenure. The most recent mandatory minimum of consequence was for first degree criminal sexual conduct with a minor under age 13 (minimum of 25 years) or a repeat CSC offense with a minor under age 13 (life without parole), 2006 PAs 165 & 169.

Felony firearm statute, 1976 PA 6, was enacted at the urging of the Wayne County Prosecutor in response to a rise in crime involving the use of firearms. One may surmise that prosecutors would prefer the status quo and one argument may be that they are uneasy with judicial discretion in sentencing for crimes involving use of a firearm. In this instance, however, the real issue is not judicial discretion but prosecutorial discretion.

Michigan may have only one felony firearm statute (MCL 750.227b), but in reality we have five different felony firearm "laws" in practice depending upon the jurisdiction:

**A.** As originally envisioned, prosecutors charge both an underlying felony (or felonies) and felony firearm and seek conviction or plea to both. The flat 2-year felony firearm is served first, and then comes what is often an indeterminate sentence to prison for the underlying felony (or felonies). [Prosecutors reputed 'to go for the jugular' prefer this "law". Note: This "law" can also result in a plea that includes dismissal of other charges.]

**B.** Felony firearm is charged but dismissed as part of a plea negotiation. Simply put, felony firearm with its fixed term is leverage for a plea. (Same as habitual offender charges in some counties. The charge facilitates a plea, and then is dismissed.) This scenario may have become more common than "law" **A**.

**C.** The relatively recent phenomenon: Felony firearm is the sole conviction with the underlying felony dismissed, so that the individual goes to MDOC (prison) for the flat 2 years – although I believe MDOC has been placing them in the so-called "virtual prisons", better known as county jails, under contracts between sheriff and MDOC. [That reduces some of prison-capacity pressures on MDOC facilities but has a downside: Those inmates are warehoused for 2 years, most likely without programming. You may wish to ask MDOC which counties are using "law" **C**.]

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D. Apparently in some instances the felony firearm conviction is accompanied by a second conviction that results not in a prison term after the flat sentence is served but a commitment to jail as part of probation for the other felony that can also lead to a period of supervision upon release from jail. [How frequently this occurs, I do not know.]

E. Just when one supposes that a reading of MCL 750.227b means at least that, upon conviction, the perpetrator will receive a flat 2-year minimum sentence in prison (for a first offense), one needs only peruse MDOC's annual statistical reports to discover that actual sentences for felony firearm include periods of less than 2 years, jail, or probation! MDOC's annual statistical reports (using the updated 2011 supplemental report and subsequent annual reports) show that from 2006 to 2013, **between 3% and 5%** of dispositions annually for felony firearm-first offense (average for the 8 years is 4.0%) are **probation** – not to mention a scattering each year of dispositions to jail or probation-with-jail. [If one includes jail and/or probation, non-prison rate is almost 5%.] Whether probation is part of a negotiated plea or acquiesced in by the prosecution, I don't know. So much for a "mandatory" prison sentence!

Times change. Before 1998 it could be argued that, but for the mandatory term for felony firearm, the convicted felon could have received a more lenient sentence or could return to the community sooner as the result of good time or disciplinary credits before the court-imposed minimum was served. Has truth-in-sentencing – with certainty that a court-imposed minimum term for the underlying felony, with use of a firearm involved, will be served in prison – lessened the need for the mandatory felony firearm sentence?

Recent history: Dispositions for felony firearm-first offense have ranged from 1,605 to 2,060 during the period of 2003 to 2013. The number of dispositions has been on a downward trend since 2007 (2,060) – 1,824 (2008), 1,693 (2009), 1,736 (2010), and 1,707 (2011). Interestingly, the felony firearm-first offense dispositions for 2012 (1,605) and 2013 (1,615) are actually lower than any other years in that period. Does this trend reflect a decline in incidence, or a change in prosecutorial plea practice?

Effect of HB 4419: If felony firearm becomes discretionary or an indeterminate sentence, HB 4419 would presumably return sentencing discretion to trial judges, but will sentencing guidelines (post-1998) for the underlying felony dampen the net effect of elimination of the mandatory term for felony firearm? How will prosecutors adjust charging and plea practices? Will pleas for felonies involving firearms become more difficult? Will those who now negotiate a plea to "law" C (conviction only for felony firearm) press for a plea to the underlying felony that has a minimum under sentencing guidelines as long as or longer than the current 2-year flat sentence (for FF) and that exposes the defendant and MDOC to a higher maximum prison term? Will prosecutors be more inclined to invoke the habitual offender statute in situations where the defendant has a prior record? Will HB 4420 dilute any felony firearm sanction? The consequences of HB 4419 may be as nuanced (and somewhat unpredictable) as under the current statute and warrant monitoring by the Legislature. In any event, the world won't end and prosecutors, judges, and defense will adapt.

Respectfully,

*/s/ Bruce A. Timmons*

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